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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-798

AMERICAN INSTITUTE OF MERCHANT SHIPPING, LINER COUNCIL, PETITIONER

v.

AMERICAN MARITIME ASSOCIATION, ET AL.

No. 75-800

AMERICAN MARITIME ASSOCIATION, PETITIONER

v.

ELLIOT L. RICHARDSON, SECRETARY OF COMMERCE, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A-1 to A-28)[1] is reported at 518 F.2d 1070. The opinion of the district court (Pet. App. A-29 to A-33) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on September 5, 1975. The petitions for a writ of certiorari

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[1] "Pet. App." refers to the separately bound appendix in No. 75-800.

were filed on December 4, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Maritime Subsidy Board was authorized to issue a regulation that would reduce operating-differential subsidies for merchant marine lines, to the extent certain cargo reserved by statute for carriage by U.S. flag vessels produced more than half of their earnings.

2. Whether the Merchant Marine Act requires the rebate of construction-differential subsidies for American-built vessels that operate in foreign commerce but do not encounter substantial foreign-flag competition.

STATUTES INVOLVED

The relevant statutes are reprinted at Pet. App. A-81 to A-98.

STATEMENT

1. The American Maritime Association ("AMA"), petitioner in No. 75-800, is an organization of unsubsidized American shipping companies. In July 1969 it requested the Secretary of Commerce to issue rules under the Merchant Marine Act of 1936, 49 Stat. 1985 *et seq.*, as amended (the "Act"), 46 U.S.C. 1101 *et seq.*, that would forbid the payment (or the award of a contract requiring the payment) of an operating-differential subsidy to any shipping company that carried "preference" cargo. Preference cargo is cargo reserved by law for shipment in U.S. flag vessels, including all military cargo, all cargo the purchase of which is financed by the Export-Import Bank, and 50 percent of certain other cargo (Pet. App. A-2, A-6).[2]

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[2]See 10 U.S.C. 2631 (military cargo); 15 U.S.C. 616a (cargo purchased with government loans); Sections 901(b), 46 U.S.C. 1241(b) (government-owned or financed cargoes).

Operating-differential subsidy contracts may be awarded under Section 601(a) of the Act, 46 U.S.C. 1171(a), only if the operation of a vessel in a particular route, line, or service "is required to meet foreign-flag competition." An operating-differential subsidy is payable under Section 603(b) of the Act, 46 U.S.C. 1173(b), only to make up the differential of certain operational costs between U.S. flag vessels and vessels of foreign-flag "substantial competitors." AMA argued that, to the extent a U.S. flag vessel carries preference cargo, its operation does not meet foreign-flag competition, since foreign-flag vessels cannot compete for or carry that cargo. Therefore, it continued, no subsidy whatever should be provided to the extent any line carries preference cargo. AMA also requested the Secretary to issue a rule requiring subsidized shipping lines to rebate the construction-differential subsidy they may have received under Section 501(a) of the Act, 46 U.S.C. 1151(a), to the extent any vessels built with the subsidy (and operated by lines receiving operating-differential subsidy) are used to carry preference cargo rather than to meet foreign-flag competition.[3]

The Maritime Subsidy Board, the Secretary's delegate, commenced rulemaking proceedings. The American Institute of Merchant Shipping, Liner Council ("AIMS"), petitioner in No. 75-798, an organization of subsidized American shipping companies, participated in the rulemaking and opposed the issuance of any rules that would require the reduction or rebate of subsidies.

2. In June 1972 the Maritime Subsidy Board announced a decision that satisfied neither petitioner.

a. With respect to AMA's contention that a vessel carrying preference cargo should not receive an operating-differential subsidy, the Board held that Section 601(a)

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[3]The rules proposed by AMA are set out at Pet. App. A-71 to A-73.

of the Act, 46 U.S.C. 1171(a), which states that a subsidy will be provided only if "required to meet foreign-flag competition," allows a subsidy to be furnished when a carrier meets "substantial" foreign-flag competition. Competition is "substantial," the Board held, if less than 50 percent of a carrier's revenue is derived from preference cargo that moves at rates insulated from foreign competition (Pet. App. A-43).[4] Determining that payment of the subsidy should not depend upon the simple absolutes postulated by either AMA or AIMS, the Board wrote (Pet. App. A-42):

> We think the statute and its legislative history clearly establish that the purpose of the [operating-differential subsidy] program is not to subsidize cargo carriage but instead to subsidize operation of vessels so that the vessels are in a position to carry cargo on a competitive basis. On the other hand, we do not accept the AIMS position that the actual performance of a vessel operator as a competitor can be ignored. Rather, it is our judgment that payment of subsidy for operation of vessels must be governed by the degree to which the competitiveness of that operation is reflected in actual operating experience.

Regulations implementing the Board's decision were adopted in October 1972. 46 C.F.R. Part 280. The regulations provide for the reduction of operating-differential subsidy on a sliding scale where less than 50 percent of gross annual freight revenues from a particular route, line, or service (computed separately for outbound and inbound voyages) are derived from cargoes subject to foreign-

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[4]The Board's decision applies only to general cargo operations in regular liner services, not to bulk carrying services. See Pet. App. A-37, n. 9; 46 C.F.R. 280.2(e); Section 211(a), 46 U.S.C. 1121(a). Bulk carriers did not become eligible for the operating-differential subsidy until 1970. See 46 U.S.C. 1121(b) and 1171(a).

flag competition.[5] 46 C.F.R. 280.4(a)(2).

b. The Board rejected AMA's claim concerning construction-differential subsidy for American-built vessels that carry preference cargo in foreign commerce. The Board pointed out that since 1952 there has been no requirement in the Act that such vessels "meet foreign-flag competition" (Pet. App. A-67). So long as a vessel engages in "foreign commerce," the Board held, it meets the requirements of Section 501(a) of the Act for a construction-differential subsidy (Pet. App. A-67 to A-68).

3. In the district court AMA urged that the Board's regulations did not go far enough in requiring reduction or rebate of the subsidies. AIMS intervened, claiming (as it does here) that the Board had no power to reduce the operating-differential subsidy. The district court granted summary judgment in favor of AIMS (Pet. App. A-29 to A-33).

AMA and the Secretary appealed. The court of appeals reversed; it upheld the Board's decision in full (Pet. App. A-1 to A-28), rejecting the arguments of both AMA and AIMS. The court of appeals wrote (Pet. App. A-24 to A-25):

> The Act consistently speaks of awarding [operating] subsidies only to vessels "meeting foreign competition". The legislative history, however, indicates that Congress had contemplated the payment of some "double subsidies" to shippers carrying preference cargo. Whether or not this is "unfair competition", as AMA contends, it was foreseen by Congress. The Board's rule reducing subsidy when a vessel is not in

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[5]Some preference cargo is deemed to be "subject to foreign-flag competition" because it is carried at "conference rates" or at competitive "world rates." See Pet. App. A-45. All non-preference cargo is deemed to be "subject to foreign-flag competition."

"substantial competition" appears to strike a sound balance between the intention of Congress and the competitive needs of the industry.

ARGUMENT

The Board and the court of appeals have dealt exhaustively with the issues raised by petitioners, and their decisions are correct. As the court of appeals concluded, the order of the Board "is a reasonable and proper determination of a difficult and complex situation, both factually and legally" (Pet. App. A-28). The decisions of the Board and the court of appeals achieve the objectives of the Merchant Marine Act. The contrary and opposed positions of the unsubsidized and subsidized companies would not further these objectives; each segment of the industry is seeking a competitive advantage at the expense of the other and of the national interest. There is no conflict among the circuits or with any decision of this Court, and no further review is warranted.

1. Petitioner AMA argues that "[u]pon the correct construction of the act hinges the economic fate of the major unsubsidized sector of the American merchant marine, which has represented the surge capacity of the nation at war or in emergency * * *" (Pet. 9). AMA contends that the demise in the last several years of the unsubsidized breakbulk fleet of the United States has been caused by the ability of subsidized carriers to underbid its members for the preference cargo upon which they depend.

That is not the case. The Board explained (Pet. App. A-64; footnote omitted):

> It is true, of course, that the unsubsidized breakbulk fleet is rapidly being scrapped or sold foreign. This status, however, seems more a product of age and condition of vessels and decreased volume of breakbulk military cargo than a product of competition with subsidized operators.

Unsubsidized operators are able to compete effectively with subsidized carriers because the law imposes substantial economic disadvantages on the latter. First, subsidized carriers are limited to regularly-scheduled services over a fixed route, while the unsubsidized lines are not. 46 U.S.C. 1121(a) and 1171(a). The operations of the unsubsidized lines therefore are more flexible and less costly. Second, the subsidized lines lose their subsidy to the extent that they engage in domestic trade. Sections 605(a) and 805(a), 46 U.S.C. 1175(a) and 1223(a). Third, the subsidized lines cannot have foreign affiliations. Section 804, 46 U.S.C. 1222. Fourth, subsidized lines must use American-built ships. 46 U.S.C. 1171(a). In light of these restrictions it should come as no surprise that one of the largest, fastest-growing and most profitable lines receives no operating-differential subsidy.[6]

2. The cargo preference laws have been instrumental in maintaining the vitality of American shipping. They represent a form of subsidy to all American lines, to the extent they enable those lines to carry more revenue-earning cargo than they otherwise would. They operate to prevent American ships from sailing "with empty or half empty holds." H.R. Rep. No. 1818, 84th Cong., 2d Sess. 2 (1956). Operating-differential subsidy makes up the difference between the cost of operating an American ship and the cost of operating a foreign ship. But the subsidized carrier, like any other carrier, must attract cargo or lose money.

The cargo preference laws were not designed to aid just the unsubsidized segment of the American merchant

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[6]Sea-Land Services, Inc. (a member of AMA), pioneered containerized cargo operations. An economic consultant for Sea-Land noted that the restrictions upon the operation of a subsidized carrier would "seriously reduce Sea-Land's flexibility of operations which have contributed significantly to profitability in the past" (AIMS Exh. 252, p. 2).

marine. But neither were they designed to permit the subsidized lines to avoid their statutory obligation to "meet foreign-flag competition" by concentrating upon the carriage of non-competitive preference cargo. The Board's decision recognizes both these points and harmonizes the operating subsidy program with the cargo preference laws by requiring a reduction of operating-differential subsidy if the subsidized line does not "substantially" meet foreign-flag competition. The Board's ruling is amply supported by the statutory language and legislative history, as the opinion of the court of appeals demonstrates (Pet. App. A-11 to A-17, A-24 to A-25). The "50 percent" rule harmonizes the statutory policies by giving equal effect to the congressional requirement of competition and the congressional authorization to carry non-competitive preference cargoes[7]. Compare *Securities and Exchange Commission* v. *Chenery Corp.*, 318 U.S. 80, with *Milk Transport, Inc.* v. *Interstate Commerce Commission*, 190 F.Supp. 350, 354-355 (D. Minn.), affirmed, 368 U.S. 5.[8]

3. AIMS argues that the Board is perpetually bound by what it contends[9] has been the Board's practice of not

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[7]AMA argues that the substantial competition rule cannot be reconciled with the Board's allegedly absolute rule against carriage of preference cargoes by bulk carriers, which became entitled to operating-differential subsidy by virtue of a 1970 amendment. See Pet. 15. There is no such general prohibition, however. AMA's quotation from the Federal Register was a description of the facts of a particular subsidy application.

[8]Cf. *Atlantic Express Lines of America—Subsidy Application*, 1 DOC 104, 110 (Section 101 of the Act, 46 U.S.C. 1101, establishing a goal of developing a merchant marine capable of carrying a "substantial portion" of the nation's foreign water-borne commerce, means that at least 50 percent of such commerce should be so carried).

[9]But see Pet. App. A-22.

reducing the operating-differrential subsidy on account of excessive carriage of preference cargo. But the Bord has done nothing more than to interpret, for the first time (Pet. App. A-38), the governing statutes. The court of appeals properly held that an agency "is free to act when conditions change and is not tied to past practices, as long as its decisions are fairly reasoned and considered" (Pet. App. A-23). This Court has articulated that principle many times. See, *e.g.*, *Helvering* v. *Wilshire Oil Co.*, 308 U.S. 90, 100-101; *National Labor Relations Board* v. *J. Weingarten, Inc.*, 420 U.S. 251, 264-267.[10]

4. AMA (Pet. 16-18) faults the Board's determination that "cargoes subject to foreign-flag competition," and therefore not subject to subsidy reduction, include conference-rated preference cargoes.

Much preference cargo is shipped at "conference" rates—rates identical to the rates that would be charged for its transportation in foreign bottoms.[11] The Board explained (Pet. App. A-50) that "[s]ince commercial [non-preference] cargo and preference cargo moving under the conference rate system are generally indistinguishable by physical characteristics, the competitive attributes of carrying conference-rated preference cargo are virtually

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[10]Congress acknowledged the instant proceedings and deferred to them. Section 40(a) of the 1970 Amendments, 84 Stat. 1037, provides that nothing in the amendments "shall be deemed to affect or to change existing law or contracts with respect to the proceedings now pending before the Secretary of Commerce relating to the payment of subsidy in respect of cargoes covered by" a preference.

[11]"Where conferences exist, the cargo rates are the same for vessels of all nations * * *." S. Rep. No. 91-1080, 91st Cong., 2d Sess. 10-11 (1970).

identical to those of carrying conference-rated commercial cargo." The Board therefore properly accorded conference-rated preference cargo a status equal to that of non-preference cargo for subsidy purposes.

5. AMA finally argues (Pet. 18-28) that construction-differential subsidies must be rebated to the extent that American-built vessels carry preference cargo, and also receive an operating-differential subsidy. Under AMA's argument its members, which receive no operating-differential subsidy, could retain their construction-differential subsidy no matter how much preference cargo their vessels transport. See AMA's proposed rule 3B, Pet. App. A-72 to A-73.

But the Act draws no distinctions based on this criterion. As its name implies, a construction-differential subsidy equalizes the costs of construction of a vessel, not the cost of its operation. Under the Act, a vessel is entitled to retain its construction-differential subsidy so long as it is engaged in "foreign commerce" of the United States. "Foreign commerce" is expressly defined in Section 905(a) of the Act, 46 U.S.C. 1244(a), as "commerce or trade between the United States * * * and a foreign country * * *." The definition does not require competition with foreign vessels. The omission is understandable, since the major purpose of the construction-differential subsidy is to enable American lines to purchase American-built vessels at a price competitive with what would be charged by foreign shipyards for foreign-built vessels. The type of cargo subsequently carried by the vessel is not material to this purpose.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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